Supreme Court, U. S.
FILED
JAN 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-899

CARL MILLER, ET AL., *Appellants*,

v.

GERALD HEFFERNAN, STATE TAX COMMISSIONER, *Appellee*.

On Appeal From the Supreme Court of Connecticut

MOTION TO DISMISS OR AFFIRM

CARL R. AJELLO
Attorney General

30 Trinity Street
Hartford, Conn.

RICHARD K. GREENBERG
Assistant Attorney General

92 Farmington Avenue
Hartford, Conn.

Of Counsel

RALPH G. MURPHY
Assistant Attorney General

92 Farmington Avenue
Hartford, Conn.

Attorneys for Appellee

INDEX

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	1
ARGUMENT	
THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THE COURT	2
CONCLUSION	5

TABLE OF CITATIONS

	Page
Allied Stores of Ohio v. *Bowers*, 358 U.S. 522 (1959)	2
Austin v. *New Hampshire*, 420 U.S. 656 (1975)	3
Barter v. *U.S.*, No. 77-490, Cert. Denied 1-9-78	3-5
Carmichael v. *Southern Coal and Coke Co.*, 301 U.S. 495 (1937)	4
Kellems v. *Brown*, 163 Conn. 478 (1972), Appeal dismissed 409 U.S. 1099 (1973)	5
Lehnhausen v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973)	3
Madden v. *Kentucky*, 309 U.S. 83 (1940)	2
Merchants and Manufacturers Bank v. *Pennsylvania*, 167 U.S. 461 (1897)	5
Royster Guano Co. v. *Virginia*, 253 U.S. 412 (1920)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. _____

CARL MILLER, ET AL., *Appellants*,

v.

GERALD HEFFERNAN, STATE TAX COMMISSIONER, *Appellee*.

On Appeal From the Supreme Court of Connecticut

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Connecticut Supreme Court on the ground that the questions upon which review is sought has been rendered so unsubstantial by the well-reasoned unanimous opinion of the Connecticut Supreme Court that no further review by this Court is necessary.

STATEMENT OF THE CASE

The appellee accepts the Statement of the Case as set forth by the appellants in the Jurisdictional Statement (pp. 4-5).

QUESTIONS PRESENTED

A. Does Section 12-506 of the General Statutes of Connecticut, which provides for a $20,000 exemption violate the equal protection provisions of Section 1 of the Fourteenth Amendment to the United States Constitution?

B. Does Section 12-505 of the General Statutes of Connecticut, which defines taxpayer to include married people filing a joint federal return violate the equal protection provisions of Section 1 of the Fourteenth Amendment to the United States Constitution?

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court.

Appellants in this appeal are challenging legislation which pertains to taxation. This appeal should be dismissed or the decision of the Connecticut Supreme Court affirmed because the questions upon which the review is sought do not present any substantial federal questions. This Court in *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940) said "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the *most explicit demonstration* that a classification is a *hostile and oppressive* discrimination against particular persons and classes". (emphasis added). Since no such explicit demonstration of hostile and oppressive discrimination can be shown by appellants, no substantial federal question is present.

This Court on several occasions has emphasized the fact that in the area of state and local taxation a federal, i.e. constitutional, question is seldom present. This Court in *Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920) at 415 said, "The latitude of discretion is notably wide in the classification of property for purposes of taxation and granting of partial or total exemptions upon grounds of policy". In *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522 (1959) at 526 this Court said: "The States have a very wide discretion in the laying of their

taxes. When dealing with their proper domestic concerns and not trenching upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal system to ensure revenue and foster their local interests".

Relying on the precedent of *Allied Stores* this Court has more recently stated in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 360 (1973).

> In that case [Allied Stores] we used the phrase "palpably arbitrary" or "invidious" as defining the limits placed by the Equal Protection Clause on state power. Id. at 530, 3 L ED 2d 480. State taxes which have the collateral effect of restricting or even destroying an occupation or a business have been sustained, so long as the regulatory power asserted is properly within the limits of the federal-state regime created by the Constitution.

A more recent expression of this rationale is set forth in *Barter* v. *U.S.*, 550 F.2d 1239 (7th Cir., 1977) cert. denied January 9, 1978, docket #77-490, wherein the Court said at page 1240:

> We agree with the district court that the inequities asserted to inhere in the "marriage penalty" whatever may be their persuasiveness as arguments for legislative change, do not rise to the level of constitutional violations of appellants' rights.

Also see *Austin* v. *New Hampshire*, 420 U.S. 656, 661-662 (1975).

The appellants are challenging the limitation provided in the dividends tax which is imposed on those taxpayers whose annual income is Twenty Thousand Dollars or more. The specific statute involved is § 12-506(a)(1) of the General

Statutes of Connecticut which provided during the period in question:

> A tax is hereby imposed at the rate of seven per cent on (1) all dividends earned, received in fact or constructively, accrued or credited to the taxpayer during his taxable year except that no such tax shall be imposed unless the taxpayer's adjusted gross income in such year equals or exceeds twenty thousand dollars. . . .

Appellants urge that a substantial federal question is present because the $20,000 demarcation places an allegedly undue tax burden on a minority of taxpayers, alleging further that a disproportionate share of the burden falls on taxpayers over sixty-five years of age. But this statute, with the demarcation, must stand "if there is any conceivable state of facts which would support it". *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937).

In asking this Court to review the decision of the Connecticut Supreme Court, the appellants have failed to demonstrate how the tax classification at issue lacks any rational basis or is "palpably arbitrary" or "invidious". The Connecticut Court determined that a reasonably conceivable state of facts existed to support this tax classification. In its opinion (Jurisdictional Statement, p. A-6), the Connecticut Court states:

> In the present case, the legislature's line may well have been drawn in light of the overall tax scheme, the fiscal needs of the state, and the economy. United States Department of Labor statistics show that in 1973, just prior to the enactment of the statute here at issue, the average cost for an urban family of four on a lower budget was $8,181 a year, while the intermediate and higher levels were $12,626 and $18,201 respectively. In Hartford, the average cost for a family of four at the intermediate level was $13,721, and at the higher level, $19,127. Conceivably, the legislature was attempting to draw a line which left the average family budget intact. While such an approach is necessarily discriminatory, the equal protection clause proscribes only "invidious discrimination but does not demand identical treatment for all persons without consideration of differences in relevant circumstances." *Karp* v. *Zoning Board*, supra, 294. "If the . . . classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." *Brown-Forman Co.* v. *Kentucky*, 217 U.S. 563, 573, 30 S.Ct. 578, 54 L.Ed. 883.

The constitutionality of the taxation of dividend income while leaving untaxed other forms of individual income (except for gains from the sale or exchange of capital assets) has been sustained by the Supreme Court of Connecticut and this Court, *Kellems* v. *Brown*, 163 Conn. 478, 313 A.2d 53 (1972) appeal dismissed, 409 U.S. 1099 (1973). Subsequently the General Assembly of Connecticut amended the tax on dividends to provide for the exclusion of persons with less than Twenty Thousand Dollars of income. If it is constitutional to tax only capital gains and dividend income then a fortiori it is valid to tax only those who are apparently better able to pay, i.e., those whose total adjusted gross income is over Twenty Thousand Dollars. Clearly the issue raised by this appeal is without a substantial federal question.

Appellants also urge that a substantial federal question is present because of the way "taxpayer" is defined to include a husband and wife's filing a joint federal tax return. However, appellants like all other named taxpayers in Connecticut, are granted the option of filing their federal tax returns jointly or separately. They may elect to take advantage of the benefits accruing under federal law through joint filing or those granted under Connecticut law through separate filing. There can be

no infringement upon equal protection guarantees and thus no federal question if the inequality results from the election of the taxpayers. See *Merchants & Manufacturers Bank* v. *Pennsylvania*, 167 U.S. 461 (1897). See also *Barter* v. *U.S.*, supra.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the final judgment entered in the cause by the Supreme Court of Connecticut.

Respectfully submitted,

CARL R. AJELLO
Attorney General
30 Trinity Street
Hartford, Connecticut 06115

RALPH G. MURPHY
Assistant Attorney General
92 Farmington Avenue
Hartford, Connecticut 06115

RICHARD K. GREENBERG
Assistant Attorney General

Of Counsel

PROOF OF SERVICE

I, Ralph G. Murphy, one of the Attorneys for the Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of January, 1978, I served a copy of the foregoing Motion to Dismiss or Affirm on counsel of record for the Appellants and Counsel for Connecticut Legal Fund herein by mailing a copy, with first class postage prepaid, addressed to counsel of record at their post office addresses.

RALPH G. MURPHY
Assistant Attorney General